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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

Case No. 79-294

CREDE CALHOUN,

Petitioner,

v.

ROBERT E. HOLMES, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This proceeding is the latest in a series of cases instituted by the petitioner against the Supreme Court of Ohio challenging the validity of rules adopted by that court which provide for the registration of attorneys and the payment of a registration fee.

Petitioner first instituted suit in the United States District Court for the Northern District of Ohio claiming that the rules were invalid under both state and federal law. The court found that venue was improper in that district and transferred the case to the Southern District, where two other actions challenging the same rules on similar grounds, were pending.

The District Court, by judgment entered October 13, 1976, dismissed petitioner's two actions. *Buschbacher* v. *Supreme Court of Ohio*. The court reviewed each of the federal claims and found them without merit. It refused to take jurisdiction over the state law claims. The opinion of the District Court is unreported. It is set forth as Appendix A to this brief.

The judgment of the District Court was affirmed by this Court. *Cuyahoga County Bar Assn.* v. *Supreme Court of Ohio*, 430 U.S. 901 (1977).

Petitioner then instituted suit in state court challenging the validity of the rules under state law. The trial court found the state law claims to be without merit and dismissed the action. The judgment of the trial court was affirmed by the Court of Appeals. *Calhoun* v. *Supreme Court of Ohio*. The opinion of the Court of Appeals has not yet been reported. It is set forth as Appendix B to this brief.

A motion to certify the record was overruled by the Supreme Court of Ohio on April 5, 1979. Petitioner did not elect to seek review in this Court.

Petitioners instituted the instant case in the Supreme Court of Ohio alleging that the Court of Appeals had failed to comply with Rule 12(A) of the Ohio Rules of Appellate Procedure. A portion of the rule is set forth in the petition. It provides in pertinent part that all errors assigned and briefed shall be passed upon by the court. Petitioner requested a writ of mandamus requiring the Court of Appeals to comply with Rule 12(A) and requiring the members of the Supreme Court of Ohio to disqualify themselves.

The Supreme Court of Ohio, on April 26, 1979, sustained a motion to dismiss and dismissed the cause.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioner failed to present his federal claims to the state court for determination.

In order to invoke the jurisdiction of this Court to review the judgment of the Supreme Court of Ohio, petitioner must show that he presented his federal claims to the state court. *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54 (1934); *Adams* v. *Russell*, 229 U.S. 353, 360-361 (1913); *F. G. Oxley Stave Co.* v. *Butler County, Missouri*, 166 U.S. 648, 654-655 (1897).

Petitioner did not present his federal claims to the state court for determination. The complaint which petitioner filed in that court is set forth in his petition (pp. A-3 *et seq.*). It contains no mention of any federal claim.

Petitioner claims that the federal claims were raised in the brief of amicus curiae. Even if the claims of third persons, might under some circumstances, enable a petitioner to invoke the jurisdiction of this Court, they would not do so in this case. A claim of jurisdiction cannot be sustained by reference to arguments in the briefs. *Lynch* v. *Pierson, supra*, 293 U.S. at 54; *Live Oak Water User's Assn.* v. *Railroad Comm.*, 269 U.S. 354, 358-359 (1926).

Petitioner is also unable to show that the state court judgment does not rest upon an adequate non-federal ground. Petitioner instituted suit in the Supreme Court of Ohio seeking a writ of mandamus. In order to justify this extraordinary remedy, petitioner was required to show some definite, specific and absolute legal duty imposed upon and violated by the respondents. *State ex rel. Long* v. *Bettman*, 24 Ohio St.2d 16, 17 (1970); *State ex rel. Board of Tax Appeals* v. *Morgan County Budget Comm.*, 174 Ohio St. 297, 299 (1963). He was also required to show that he had no adequate remedy in the ordinary course of the law. Paragraph 3 of the syllabus of *State ex rel. Pressley* v. *Indus. Comm.*, 11 Ohio St.2d 141 (1967); *Lippert* v. *Engle*, 52 Ohio St.2d 67 (1977).

Petitioner's complaint (Pet. A-3 *et seq.*) alleges no facts which show that the respondents violated any legal duty. It also fails to allege facts which show that he did not have an adequate remedy by way of appeal from the judgment of the state court of appeals. The Supreme Court of Ohio would, therefore, have been justified in dismissing his complaint on either, or both, of these grounds.

In this situation, where the judgment might have rested on an adequate non-federal ground, this Court has stated that it will not take jurisdiction to review the judgment. *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952); *Lynch* v. *New York ex rel. Pierson, supra*, 293 U.S. at 54-55.

2. Petitioner is precluded from relitigating his claim that respondents' interest in the proceeding required them to disqualify themselves.

The question of whether the members of the Supreme Court of Ohio constituted a fair and impartial tribunal was litigated in, and determined by, the District Court.

In the action which petitioner instituted in federal court, he argued that he would be denied his due process right to a fair hearing before an impartial tribunal if he were to present his objections to the

registration fee to the Supreme Court of Ohio because of that court's interest in maintaining and managing the fund resulting from the collection of such fees.

The District Court rejected the argument and found that the Supreme Court of Ohio would be a fair and impartial tribunal. *Buschbacher* v. *Supreme Court of Ohio, supra,* (App. 3a to 4a hereto).

The judgment of the District Court was affirmed by this Court. *Cuyahoga County Bar Assn.* v. *Supreme Court of Ohio, supra,* 430 U.S. 901.

Petitioner is precluded by the doctrine of collateral estoppel from relitigating, in this proceeding, the question of whether the members of the Supreme Court of Ohio are a fair and impartial tribunal to determine his claims. *Campbell* v. *Rankin,* 99 U.S. 261, 263 (1879); Restatement, *Judgments,* §69(1) (1942); Restatement, 2d *Judgments,* §68 (Tent. Draft No. 4, 1977); 1B Moore, *Federal Practice,* 377, ¶0.441[2].

3. The issues are not important enough to warrant review.

Petitioner claims that his due process rights were violated because the members of the state supreme court did not disqualify themselves and because the state court of appeals did not comply with the state appellate rules.

Respondents submit that an examination of the opinion of the state court of appeals, set forth as Appendix B hereto, shows that the court did pass upon each of the assignments of error in compliance with the provisions of Rule 12(A). Even if it failed to do so, however, it would not present a federal claim. The failure to follow the applicable state law does not violate any federally protected right. *Gryger* v. *Burke,* 334 U.S. 728, 731 (1948); *Snowden* v. *Hughes,* 321 U.S. 1, 11 (1944).

Petitioner did name the individual members of the state supreme court as parties to the mandamus proceeding. This is not a sufficient basis, however, for them to disqualify themselves. The only allegation concerning these respondents is that they were the duly elected members of that court. This falls far short of the personal abuse or criticism which would create a constitutionally impermissible probability of actual bias. *Compare Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975).

These respondents have no official or financial interest in the subject matter of the mandamus proceeding. The only issue presented in that proceeding is whether the court of appeals followed the state rules of appellate procedure.

Petitioner claims that these respondents have an interest in the fund resulting from the collection of registration fees. The registration fee is the subject matter of a related action. *Calhoun* v. *Supreme Court of Ohio, supra,* App. B hereto. Respondents submit that the question of whether they should disqualify themselves should have been raised in that case rather than the instant case.

In any event, however, any interest which these respondents might have in the registration fees is not sufficient to create the probability of actual bias. Some of these respondents were members of the court at the time the court adopted the rule providing for registration fees. This does not mean that these respondents would not be a fair and impartial tribunal to determine the validity of that rule.

This Court adopted the Federal Rules of Civil Procedure. This did not prevent it from determining the validity of such rules. *Mississippi Pub. Corp.* v. *Murphree,* 326 U.S. 438, 444 (1946).

Respondents have no personal financial interest in the money derived from the registration fees. It has no effect on the amount of their compensation and no portion of that compensation is paid from the registration fees. The compensation of the members of the state supreme court is set by the state legislature and is paid from the state treasury. Section 141.04 of the Ohio Revised Code.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 1979, three copies of the Respondents' Brief in Opposition were sent by United States first class mail, postage prepaid, to Crede Calhoun, 408 Mall Building, 118 St. Clair Avenue, N.E., Cleveland, Ohio 44114, Pro Se. I further certify that all parties required to be served have been served.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

MICHAEL S. BUSCHBACHER, ET AL.,
Plaintiffs,

v.

SUPREME COURT OF OHIO, ET AL.,
Defendants.

C-2-75-743
C-2-75-751
C-2-76-309

OPINION

Before John W. Peck, Circuit Judge and Joseph P. Kinneary and David S. Porter, District Judges.

Kinneary, District Judge. Plaintiffs in these actions assert the unconstitutionality of Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio which requires practicing attorneys to pay a biennial $50.00 registration fee used to maintain a fund for the investigation of professional misconduct. The claims for relief are alleged to arise under 42 U.S.C. §1983, and this Court has jurisdiction under 28 U.S.C. §1343(3), (4). On July 9, 1976, a three judge court was convened pursuant to 28 U.S.C. §§2281, 2284, to determine the issues presented in these actions.

This matter is now before the Court on the motions of the defendants to dismiss the complaints.

Plaintiffs in these three cases are Michael S. Buschbacher, Thomas A. Schaffer, Daniel D. Connor and Crede C. Calhoun, all attorneys admitted to the practice of law in Ohio, and the Cuyahoga County Bar Association, a non-profit corporation organized under the laws of the State of Ohio.

Defendants are the Supreme Court of Ohio, Chief Justice C. William O'Neill, and the associate justices of the Supreme Court of Ohio.

Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio requires attorneys to register biennially with the Clerk of the Supreme Court of Ohio and to pay a registration fee of $50.00. If an attorney fails to register a pay the fee, he is not "entitled to practice law or hold himself out as authorized to practice law or hold judicial office" in Ohio. Rule VII(6); Rule VIII. The fund generated by the registration fee is used to pay the expenses of the Board of Commissioners of the Unauthorized Practice of Law and the Grievance Committees of local bar associations.

The complaints allege substantially identical claims for relief. Plaintiffs maintain that Rule VII deprives them of procedural and substantive due process rights, denies them equal protection of the law and interferes with their freedom to associate with other attorneys. Plaintiffs further contend that the Supreme Court of Ohio acted in contravention of state law in promulgating Rule VII. Finally, plaintiffs in C-2-75-743 allege that Article IV, Section 5 of the Ohio Constitution is void for vagueness. Each of these claims for relief will be considered below.

Procedural Due Process

Plaintiffs allege that Rule VII violates the due process clause both because it provides no notice that failure to pay the registration fee will automatically result in an attorney's suspension, and because there is no provision for a hearing. Further, plaintiffs contend that if a hearing is in fact held, there is ultimately no fair and impartial tribunal within the state, since the Supreme Court of Ohio, the body adopting the rule and establishing its enforcement machinery, is the ultimate decision-maker.

Plaintiffs have no standing to assert the notice claim. At the time the suit was filed and the causes of action are alleged to have arisen, each plaintiff knew of his obligation to pay the registration fee and the consequences of nonpayment. Plaintiff Cuyahoga County Bar Association alleges neither that any of its members were without notice of Rule VII nor that any of its members have acted to their detriment. Consequently, there is no case or controversy between plaintiffs and defendants with respect to the question of notice. *See Warth* v. *Seldin,* 422 U.S. 490 (1975); *O'Shea* v. *Littleton,* 414 U.S. 488 (1974).

Plaintiffs' contention that the Rule denies them their due process right to a hearing is without merit. Rule V of the Supreme Court Rules for the Government of the Bar of Ohio provides for notice and hearing prior to suspension or disbarment from the practice of law and the Constitution does not require a hearing prior to the act which gives rise to the disbarment proceeding.

Plaintiffs further argue that they are in any event denied a fair hearing under Rule V because the Supreme Court of Ohio, the ultimate decision-maker, has an interest in maintaining and managing the fund created by the operation of its own Rule VII. While it is true that a fair and impartial decision-maker is required when interests afforded procedural protection by the due process clause are at stake, the decision-maker need not be devoid of all possible bias. There is, furthermore, a presumption in favor of the honesty and integrity of the decision-maker, and the plaintiffs have a heavy burden of showing a substantial risk of actual bias. *Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975).

In this country, state supreme courts are generally charged with the responsibility of establishing and administering disciplinary rules for the regulation of the practice of law. Furthermore, it is normal for state supreme courts to assess fees in order to effectuate the administration of that responsibility. *See, e.g., May* v. *Supreme Court of Colorado,* 508 F.2d 136 (10th Cir. 1974); *Cantor* v. *Supreme Court of Pennsylvania,* 353 F.Supp. 1307 (E.D. Pa. 1973) *affirmed,* 487 F.2d 1394 (3d Cir. 1973); *Berberian* v. *Rhode Island Bar Association,* No. 74-1030 (1st Cir. April 3, 1974) (unreported decision); *In re Reed,* 257 A.2d 382 (Del. 1969); *Petition of Florida State Bar Association,* 40 So.2d 902 (Fla. S. Ct. 1949); *Wallace* v. *Wallace,* 225 Ga. 102, 166 S.E.2d 718, 723-25 (1969); *In re Unification of the Bar of Hawaii,* 432 P.2d 887 (Haw. 1967); *Ayers* v. *Hadaway,* 303 Mich. 589, 6 N.W.2d 905, 907-08 (1942); *Sharood* v. *Hatfield,* 296 Minn. 416, 210 N.W.2d 275 (1973); *Application of President of Montana Bar Association,* 518 P.2d 32 (Mont. 1974); *In re Platz,* 60 Nev. 295, 108 P.2d 858, 864 (1940); *In re Unification of New Hampshire Bar,* 248 A.2d 709 (N.H. 1968); *In re Gibson,* 4 P.2d 643, 649 (N. Mex. 1931); *Sweeney* v. *Cannon,* 380 N.Y.2d 633, 282 N.E.2d 332 (1972); *In re Integration of State Bar of Oklahoma,* 185 Okla. 505, 95 P.2d 113 (1939); *Bennett* v. *Oregon State Bar,* 470 P.2d 945 (Ore. 1970). The mere fact that it was the Supreme Court of Ohio that imposed the registration fee does not render that court a biased forum for the determination of whether or not an attorney should be disciplined for failure to pay the fee. Likewise, the Supreme Court's control over the investigation and prosecution of disciplinary charges does not render it an inappropriate tribunal.

In reaching this conclusion, this Court is guided by the decisions of the Supreme Court of the United States in *Withrow* v. *Larkin, supra,* where a state medical board which combined investigatory and adjudicatory functions was held to be an impartial tribunal and in *Hortonville Joint School District No. 1* v. *Hortonville Education Association,* ___ U.S. ___ (June 17, 1976), in which a school board embroiled in a dispute with a teacher's association was held to be a fair tribunal for the determination of whether or not a teacher should be discharged. The Court is therefore of the opinion that the Supreme Court of Ohio is a fair and impartial tribunal to finally adjudicate disciplinary action taken under Rule V for failure to pay the fee required by Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio.

Finally, plaintiffs argue that the methods employed by the Supreme Court of Ohio in adopting Rule VII did not comport with due process. Plaintiffs allege, however, no facts in support of their contention and this Court is of the opinion that the Supreme Court of Ohio duly followed established procedures for the adoption of a Rule for the Government of the Bar of Ohio. The due process clause requires no more. *Cf. In re Reed, supra.*

Substantive Due Process

Plaintiffs assert that they have been granted a right to practice law that cannot be infringed upon or denied to them by the imposition of a registration fee designed to generate financing for the policing of the profession. Relying upon *Bradley* v. *Fisher,* 80 U.S. 335 (1871), *Ex parte Bradley,* 74 U.S. 364 (1868), and *Ex parte Garland,* 71 U.S. 333 (1866), plaintiffs argue that they cannot be deprived of the right to practice law except for moral or professional delinquency.

These cases are inapposite to the proposition for which they are cited. The *Bradley* cases involved the disbarment by a federal court of the attorney representing John H. Surratt in his trial for the murder of President Lincoln. The attorney, Bradley, was alleged to have rudely accosted and threatened the trial judge. In *Ex parte Bradley, supra,* the Supreme Court held that although the courts have the undoubted power to punish attorneys for misconduct, an attorney cannot be disbarred without notice and opportunity to defend. 74 U.S. at 374. The Supreme Court held in *Bradley* v. *Fisher, supra,* that the trial judge was immune from suit by Bradley. *Ex parte Garland* was a suit by an attorney for his re-admission to the practice of law in a federal court without taking an oath that he had not held an office under the Confederate government. Garland had held a Confederate office, but after the Civil War he had received a Presidential pardon. In the course of holding that the oath was an *ex post facto* law inflicting punishment for treason, the Supreme Court stated that an attorney can be deprived of the right to practice his profession only for "moral or professional delinquency." 71 U.S. at 379. These cases do not, in the view of this Court, stand for the proposition that courts are prohibited from establishing reasonable rules for the governance of the bar, including the assessment of a fee in order to effectuate those rules. In any event, failure to comply with reasonable rules for the governance of the bar is surely an act of professional delinquency.

At base, plaintiffs argue that once they are admitted to the bar, the Supreme Court of Ohio can adopt no rule the noncompliance with which would deprive them of the right to practice law. This proposition is supported by neither logic nor case law and the constitutionality of an assessment imposed for the first time subsequent to an attorney's admission to the bar is beyond question. *See In re Reed,* 396 U.S. 274 (1970); *Lathrop* v. *Donohue,* 367 U.S. 820 (1961). Thus, plaintiffs' argument that the registration fee is unconstitutional because it was imposed as a condition of practicing law subsequent to their admission to the bar is without merit.

In short, plaintiffs cannot succeed in their substantive due process claim unless they show that there is no rational connection between Rule VII and defendants' interest in regulating the bar. *See Kelley* v. *Johnson,* 44 U.S.L.W. 4469, 4472 (April 5, 1976); *North Dakota State of Pharmacy* v. *Snyder's Drug Store,* 414 U.S. 156, 164-67 (1973); *Ferguson* v. *Skrupa,* 372 U.S. 726, 730-32 (1963). The Supreme Court of Ohio has the duty to limit the practice of law to those professionally and morally qualified, and the registration fee is intended to generate a fund to finance the accomplishment of that end. There is, consequently, a rational relationship between the fee and the Supreme Court's duty of regulating the practice of law.

Equal Protection

Attorneys employed by the federal government are not required to pay a registration fee and plaintiffs contend that this exception to the application of the operation of Rule VII deprives them of the equal protection of the laws. In the area of social and economic welfare, discrimination by the state does not violate the equal protection clause if that discrimination is reasonably related to a legitimate state purpose. *Mourning* v. *Family Publications Services, Inc.,* 411 U.S.

356, 369 (1973). Defendants suggest that the exemption of federal employees promotes the legitimate state purposes of maintaining harmonious relations and of avoiding needless friction between the state and federal governments. *Cf. Railroad Commission* v. *Pullman Company*, 312 U.S. 496, 500-01 (1941). Plaintiffs advance no countervailing argument and this Court concludes that the Rule VII exemption is rationally related to a legitimate state purpose.

Void For Vagueness

Plaintiffs in C-2-75-743 contend that Article IV, Section 5 of the Ohio Constitution is void for vagueness. That portion of the Ohio Constitution provides in part that

> [t]he Supreme Court . . . shall make rules governing the admission to the practice of law and discipline of persons so admitted. . . .

Because they contain broad grants of authority, constitutions employ general language and are not intended to be narrowly drawn codes. There is nothing vague about Article IV, Section 5. It empowers[1] the Supreme Court of Ohio to regulate admission to the bar and to administer discipline, and courts generally have assumed such authority with or without constitutional sanction. *See, e.g., Ex parte Garland, supra*, 71 U.S. at 379; *Ex parte Bradley, supra*, 74 U.S. at 374.

Rule VII itself is narrowly drawn and affords to plaintiffs all the protection mandated by the First and Fourteenth Amendments against overbroad restrictions on speech and association.

Freedom Of Association

Plaintiffs further contend that suspension for failure to pay the registration fee will result in the unconstitutional deprivation of the freedom to associate with fellow attorneys. Disbarment would, of course, terminate the privileges associated with the practice of law. However, the limitation of associational rights would flow, not from any constitutional infirmity in Rule VII, but rather from the attorney's own failure to comply with the Rules for the Government of the Bar of Ohio. Because Rule VII is constitutionally sound, plaintiffs have no claim for relief based on the First Amendment's protection of the right to freedom of association.

[1]The Supreme Court of Ohio has held that it has the inherent judicial authority to control admission to the bar and to discipline its members. *In re Nevius*, 174 Ohio St. 560, 562-63 (1963).

Pendent State Law Claim

Finally, plaintiffs allege that the adoption of Rule VII by the defendants is contrary to state law. This is a pendent claim, of course, which this Court may in its discretion refuse to consider. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

Admission to the bar and discipline of attorneys are traditionally matters within the exclusive jurisdiction of the court of whose bar the attorney is a member. Each jurisdiction has its own rules and practices and for this Court to substitute its judgment for that of the Supreme Court of Ohio in a matter so intimately involving that court's authority and jurisdiction would be peculiarly inappropriate. Plaintiffs should seek resolution of their state law questions in the state forum.

APPENDIX B

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

CREDE CALHOUN, ET AL.,
Plaintiffs-Appellants,

v.

SUPREME COURT OF OHIO, ET AL.,
Defendants-Appellees.

Case No. 78AP-177

DECISION

Rendered on October 26, 1978

HOLMES, P. J.

This matter comes before the court on appeal from a judgment on the pleadings rendered by the Franklin County Court of Common Pleas for defendants Supreme Court of Ohio and the justices of that court, and for Mr. Thomas Startzman, the clerk of such court. Plaintiffs below, appellants in this court, sought a declaratory judgment on numerous issues relating to the constitutional and statutory power of the defendants to promulgate rules to levy attorney registration fees and to maintain a fund for regulating the practice of law in the state.

The facts in brief giving rise to this action, and to this appeal, are that the Supreme Court of Ohio adopted Rule VII of the Rules for the Government of The Bar (Gov. R. VII), effective October 25, 1975. This rule provides for the registration of all attorneys in the state and for the biennial payment of a registration fee of fifty dollars.

At the time of adopting Gov. R. VII, The Supreme Court also amended Rule V. This amendment provides for the creation of the office of disciplinary counsel. The disciplinary counsel aids local bar associations in investigations of alleged misconduct, and also has the responsibility to take over investigations of misconduct which have not been completed within a specified time.

Funds for the compensation of staff and for the operations of the office of disciplinary counsel are provided from the registration fees collected pursuant to Gov. R. VII.

The Supreme Court also adopted Gov. R. VIII, which rule created the Board of Commissioners on the Unauthorized Practice of Law. The rule provides for the procedures for processing complaints alleging unauthorized practice of law. The rule also provides that the expenses incurred by local bar associations in handling the complaints shall be paid from the registration fees collected pursuant to Gov. R. VII.

Plaintiff-appellant Cuyahoga County Bar Association instituted an action in the federal district court against the defendants in this action, claiming that the rules concerned with herein were unconstitutional. Plaintiff Crede Calhoun, a practicing attorney, was made a party to such action. A three-judge court found that the constitutional objections to the rules were without merit, and that the rules were in compliance with provisions of the federal Constitution. The federal court noted that the plaintiffs had alleged that the adoption of the rules was contrary to state law, and found that such was "a pendent claim" which that court had discretion to refuse to consider. Accordingly, the court declined to exercise pendent jurisdiction, and dismissed that federal action on the basis that the complaint failed to state a claim upon which relief could be granted. The judgment of the district court was affirmed by the Supreme Court of the United States in *Cuyahoga County Bar Assn.* v. *Supreme Court of Ohio* (1977), 97 S.Ct. 1167.

The plaintiffs Cuyahoga Bar Association and Crede Calhoun thereafter brought this action in the Franklin County Court of Common Pleas, seeking a declaratory judgment on numerous issues which questioned the constitutional and statutory powers of the defendant Supreme Court to levy the aforestated attorney registration fees, and to maintain a fund for regulating the practice of law in the state.

The gravamen of the plaintiffs' complaint is that defendants, in promulgating and enforcing Rules V, VII and VIII of the Rules for The Government of The Bar, have enacted a tax upon attorneys in order to raise public revenue to create a fund to defray expenses of the state; that the defendants have established a state agency, and appointed public officers and employees; that the defendants have appropriated revenue of the state, and have not paid such collected funds into the state treasury, contrary to the requirements of R.C.

131.01 and R.C. 131.07; and, that the defendants have exercised all of these powers absolutely and without limitation.

It is further contended that the exercise of these powers by the defendants violates numerous provisions of the Ohio Constitution and several statutes of the state. Plaintiffs additionally claim that defendants are acting contrary to the provisions of Article IV, section 5 of the United States Constitution, as well as in violation of the due process and equal protection clauses of the Fourteenth Amendment.

Subsequent to the filing of the complaint, defendants filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Civ. R. 12(B) (1). The trial court denied the motion, holding that R.C. Chapter 2721 conferred upon the court jurisdiction to render a declaratory judgment on the issues raised by the complaint, and rejecting defendants' contention that the Supreme Court's jurisdiction over matters relating to the practice of law is exclusive. In accordance with this ruling, the court instructed defendants to file an answer to the complaint.

Defendants' answer sets forth five defenses. In the first, defendants admit many of the factual allegations of the complaint, but deny plaintiffs' right to a judgment in their favor as a matter of law. The second defense is a reassertion of the earlier contention that the trial court lacks subject matter jurisdiction over the issues raised in the complaint. In their third defense, defendants claim that the federal constitutional issues raised by plaintiffs are barred by the doctrine of *res judicata*. Finally, the fourth and fifth defenses assert that plaintiffs have failed to state a claim upon which relief may be granted.

The issues having been joined by the submission of all pleadings, defendants moved for judgment on the pleadings under Civ. R. 12(C). The trial court granted the motion "for the reasons contained in the opinion of the court which was read into the record on February 10, 1978."

The court's opinion, which was incorporated by reference in the judgment entry, holds that the Ohio Supreme Court has the inherent power to promulgate rules regulating the practice of law, and that where these rules conflict with statute the rules prevail. The court further determined that R.C. 131.01 and R.C. 131.07 do not apply to the attorney registration fees assessed by the Supreme Court. The trial court found that issues of fact remained in the pleadings, but that

none of these disputed facts were material to the fundamental issues in the case. On the basis of these holdings, the court concluded that "reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for judgment on the pleadings was made."

In appellant Cuyahoga County Bar Association's first assignment of error it is argued that:

> "The Court erred in attempting to dispose of this action, being an action for a declaratory judgment, by rendering a judgment on the pleadings."

It is urged that a judgment on the pleadings in an action for declaratory judgment has absolutely no legal effect.

Although it is true that an action for declaratory judgment seeks no recovery other than a declaration of the legal rights and relations of the parties, this does not preclude a court from granting judgment on the pleadings in appropriate circumstances. The cases cited by appellants in this regard are distinguishable.

In *Bruckman* v. *The Bruckman Co.* (1938), 60 Ohio App. 361, cited by appellants, defendant demurred to plaintiff's petition for declaratory judgment. The trial court dismissed the action for failure to state a cause of action. The judgment was reversed on appeal, the court holding that dismissal of a declaratory judgment action for failure to state a cause of action is appropriate only where the plaintiff has failed to bring himself within the provisions of the declaratory judgment statutes. The court found that plaintiff had stated a claim under the declaratory judgment provisions of the General Code and therefore was entitled to prevail against the demurrer.

The instant case is distinguishable from *Bruckman,* in that a judgment on the pleadings is generally a decision on the merits, while dismissal for failure to state a claim constitutes a finding that the statement of the claim for relief is insufficient on its face. 5 Wright & Miller, Federal Practice and Procedure, sec. 1349, 1367 (1969). The *Bruckman* court seemingly recognized this distinction when it stated that:

> "The court in the instant case wrote a very comprehensive and, in our opinion, accurate decision upon the merits of the plaintiff's contention, finding against him. If such findings had been incorporated in a *judgment after proper pleadings,* the rights of the plaintiff in the matter would have been properly considered." (Emphasis added.)

Appellants also cite *Alsop* v. *Heater* (1975), 45 Ohio App.2d 201, in support of the proposition that judgment on the pleadings is improper in an action for declaratory judgment. That case, however, merely holds that if a justiciable issue has been raised in a declaratory action, then it is inappropriate to grant a directed verdict without declaring the rights and relations of the parties.

That judgment on the pleadings is appropriate under certain circumstances in an action for declaratory judgment is apparent from a reading of Civ. R. 57, which states in part that:

> "The procedure for obtaining a declaratory judgment pursuant to sections 2721.01 to 2721.15, inclusive, of the Revised Code, shall be in accordance with these rules."

We hold that judgment on the pleadings may be granted pursuant to Civ. R. 12(C) in an action for declaratory judgment where there exists no material issue of fact and one party is entitled to a declaration in his favor as a matter of law. See Borchard, Declaratory Judgments, 2d Edition, at page 432; 22 American Jurisprudence 2d, Declaratory Judgments, section 93. Appellant Bar Association's first assignment of error is hereby dismissed.

In appellant Bar Association's third assignment of error it is contended that:

> "The Court erred in undertaking to dispose of this action for a declaratory judgment by a judgment on the pleadings when there are important issues of fact between the parties, the determination of which requires consideration of substantial evidence which the plaintiffs were prevented from presenting."

If it is true, as urged by appellants, that there existed issues of fact material to the disposition of this case, then judgment on the pleadings was improper, and the cause must be remanded for a trial on the merits. *George C. Frey Ready-Mixed Concrete, Inc.* v. *Pine Hill Concrete Mix Corp.* (2d Cir. 1977), 554 F.2d 551, 553. Determination of this issue requires an examination of the allegations set forth in the complaint.

The allegations constituting the complaint in this action continue at length for some sixteen pages. In the interest of brevity, detailed discussion of the allegations will be confined to several significant portions of the complaint. Most of the issues raised concern the defendants' rights, under the Ohio Constitution, to assess attorney

registration fees, and to maintain a fund for the regulation of the practice of law. Because these issues may be decided by judicial construction of constitutional and statutory provisions, they present issues of law, and are susceptible of summary treatment by the court.

Also the issue of whether R.C. 131.01 and R.C. 131.07 are applicable to the fees collected pursuant to Gov. R. V, and whether such fees must be paid into the state treasury, is also a question of law and could be determined by the trial court upon a motion for judgment upon the pleadings.

We now turn to the matter of whether the trial court was correct in its determination of the legal issues presented here. Historically, the Supreme Court of Ohio has, through the exercise of its "inherent powers," concerned itself with the matters related to the control of the practice of law. By way of Rule XIV of the Supreme Court Rules of Practice, it had provided for the procedures for admission to the bar and, as of January 1901, had established the board of bar examiners. By rule of practice XXVII, the Supreme Court, in January 1957, created the board of commissioners on grievances and discipline for the review of complaints of misconduct of attorneys and judges. The work of this board in the furtherance of disbarment, removal, and disciplinary procedures has proceeded to operate in such areas of concern since its creation, and until the adoption of Gov. R. VIII.

The practice of the Supreme Court of adopting rules which imposed assessments within the general area of the control of the practice of law is also well established. Section 6 of Rule XIV, of the rules of the Supreme Court, provided that every law student must file an application for registration as a candidate for admission to the bar and pay a registration fee of ten dollars. Section 12 of those rules provided that every applicant for examination must pay an examination fee of thirty dollars. This requirement of registration and examination fees has been in effect since June 7, 1923.

By case law, it has long been held that the Supreme Court has the "inherent power" to regulate the practice of law in the state. In the case of *In re Thatcher* (1909), 80 Ohio St. 492, the Supreme Court, construing its jurisdiction over disciplinary proceedings involving the disbarment of attorneys, held in the syllabus as follows:

> "1. The Supreme Court of Ohio has inherent jurisdiction of proceedings to disbar an attorney, resulting as an incident of its organization as a court, as well as from its power to admit to the bar.
>
> "2. The provisions of Section 563, Revised Statutes, are not an attempted enlargement of the jurisdiction of the several courts therein named, in contravention to the constitution, but are regulative provisions recognizing already existing powers of the courts.
>
> "***"

In the same regard as to the Supreme Court's interpretation of its own jurisdiction relative to matters of the practice of law, see *In re Nevius* (1963), 174 Ohio St. 560, and *Cleveland Bar Assn.* v. *Pleasant* (1958), 167 Ohio St. 325.

In Ohio, this inherent power to regulate and define the practice of law has been embodied in the Modern Courts Amendment of 1968, now Article IV, section 2(B) (1) (g) of the Ohio Constitution. Within the staff comments relative to such proposed amendment to the Constitution, to be found in the Ohio Legislative Service Commission Staff Research Report, Number 75, entitled Problems of Judicial Administration, we find the following:

> "The court is given authority over admission to the practice of law, the discipline of persons admitted to practice, and over all other matters relating to such practice. While this authority is now exercised by the Supreme Court, the committee received considerable testimony, both pro and con, as to whether this was part of the inherent power of the court or whether such authority should be conferred by the Constitution. Committee consensus was that it should be so included."

The rules questioned herein followed the passage of the Modern Courts Amendment to the Ohio Constitution, such rules being deemed necessary by many within the legal profession in order to aid and improve the procedures for professional discipline, with the aim of achieving the highest possible professional conduct, and to protect the public from unethical conduct. The determination to assess a fee from all attorneys in the state was based on the recognized need to obtain the services of a professional staff to investigate complaints of misconduct throughout the state. Prior to the present rules, the investigations were conducted by practicing attorneys throughout Ohio who, through their dedicated and sincere service, involved themselves in many, many hours of investigation and report drafting in these disciplinary cases. The need for a professional staff to relieve practicing attorneys of such responsibility was well documented.

While there is no case law from this state addressing the issue of the Supreme Court's power to raise and maintain a fund for the purpose of regulating the practice of law, such funds have been upheld in other jurisdictions on the basis that they are necessary incidents to a court's inherent power to regulate the bar. *Petition of Florida State Bar Assn.* (1949), 40 So.2d 902. Also see *Ayres* v. *Hadaway* (1942), 303 Mich. 589, 6 N.W.2d 905; *Matter of Washington State Bar Assn.* (1976), 86 Wash.2d 624, 548 P.2d 310.

In the case of *Petition of Florida State Bar Assn., supra,* the court, among other issues, considered whether the power to "integrate" or to uniformly register all members of the bar of the state of Florida carried with it the power to impose a membership fee for the support of bar integration activities. The court, in answer to such issue, stated as follows within its opinion:

> "A membership fee in the bar association is an exaction for regulation only, while the purpose of the tax is revenue. In City of Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885, 9 L.R.A. 69, 23 Am. St. Rep. 558, this distinction was recognized. It was also recognized in United States v. Butler, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914. These cases also recognize the rule that the power to regulate may carry with the imposition of a charge for that purpose. If the judiciary has inherent power to regulate the bar, it follows that as an incident to regulation it may impose a membership fee for that purpose. It would not be possible to put on an integrated bar program without means to defray the expense. We think the doctrine of implied powers necessarily carries with it the power to impose such an exaction."

We are in agreement with the Florida Supreme Court and other courts which have held that the jurisdiction or power of a court over matters relating to the practice of law, inclusive of admission to the bar, investigations of claims of unethical practice and disciplinary actions including disbarment, includes within such power by reasonable necessity the authority to do those things necessary or attendant to the appropriate carrying out of such general powers, including the power to impose a membership fee for the support of such related activities.

Generally speaking, those powers which are necessary to the convenient and efficient exercise of its functions are said to be inherent in a court. *State, ex rel. McKean* v. *Graves* (1914), 91 Ohio St.23; also see *Held* v. *State* (1896), 55 Ohio St. 210. A court may act in a manner reasonably calculated to achieve a valid stated purpose, the purpose being valid so long as necessary to the convenient and efficient exercise of its functions.

The context in which the term "jurisdiction" is used in section 2(B) (1) (g) of the Constitution, the legislative history of that provision, and the conditions existing at the time of its adoption, clearly establish that the framers and adopters of this section used the term "jurisdiction" in the sense of power or authority vested in the Supreme Court over matters relating to the practice of law, and intended to clarify and codify the inherent authority of the Supreme Court over all matters relating to practice of law in this state.

The plaintiffs in the trial court below, and also upon this appeal, argue that even though the rules might be held to be unconstitutional, the Supreme Court is required, pursuant to Chapter 131 of the Revised Code, to deposit registration fees in the state treasury payable to the general fund of the state. We hold that the trial court properly rejected this claim as the trial court explained in its decision that if the court had construed the statutes to require the registration fees to be paid into the state treasury, the court would have been compelled to find the statutes invalid.

Matters concerning the practice of law are judicial in nature and primarily under the control of the judicial branch of the government. The General Assembly may enact statutes concerning such matters, but they have been interpreted as aids or guides to the judiciary. Such statutes are subservient to any rule adopted by the Supreme Court. *In re Nevius, supra.* In this discussional vein, we may cite the case of *Sharood* v. *Hatfield* (1975), 296 Minn. 416, 210 N.W.2d 275. The facts in that case show that the Minnesota legislature passed a statute which directed that registration fees to practice law provided for by court order should be directed to the general revenue fund of the state, and left to legislative discretion the matter of an appropriation to the Supreme Court for purpose of regulating the practice of law. The court rejected this attempted assertion of power by the legislature holding these provisions regulating the practice of law a constitutionally impermissible assumption of judicial power. It noted that the doctrine of separation of powers "not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the imposition, by one, of any duty upon either of the others not within the scope of its jurisdiction."

We hold that the trial court here properly held that Chapter 131 is not applicable to the collection of registration fees for the practice of law in Ohio, and the trial court properly did not construe sections R.C. 131.01 and R.C. 131.07 as being unconstitutional, and correctly applied the statutory interpretation which holds that where a statute is susceptible of two interpretations, one of which would render it

constitutional and the other unconstitutional, the court is required to choose the interpretation which will preserve its validity. *United Air Lines* v. *Porterfield* (1971), 28 Ohio St.2d 97; *Cincinnati* v. *DeGolyer* (1971), 25 Ohio St.2d 101.

As to any allegations or claims as contained in plaintiffs' complaint relating to any violation of the federal Constitution, we hold that such issues had been previously litigated in the federal court in the case of *Cuyahoga County Bar Assn.* v. *Supreme Court of Ohio, supra.* The plaintiffs are precluded by the doctrine of *res judicata* from relitigating in this action any claim which was litigated, or could have been litigated, in the federal court, and this would include any issues as raised and litigated as to the validity of the rules under the equal protection and due process clauses of the Fourteenth Amendment.

We also hold that the claims of violation of plaintiffs' due process and equal protection rights under the Ohio Constitution are without merit. The requirements of equal protection and due process of law of the Ohio Constitution are in essence the same as those to be found in the federal Constitution. *State, ex rel. Struble* v. *Davis* (1937), 132 Ohio St. 555, and *In re Appropriation of Easements* (1957), 104 Ohio App. 243. We hold that no such rights of these plaintiffs have been violated by the rules in question herein.

In the instant case, the trial court in ruling upon the motion for judgment on the pleadings spoke to the legal issue of the exercise of authority by the Supreme Court in promulgating rules relative to the regulation of the practice of law. The trial court pointed out that the Supreme Court had previously spoken to such issue in the case of *In re Nevius, supra.* As stated previously, the trial court also ruled on the issue of whether the fees collected pursuant to Gov. R. V need be deposited in the state treasury, pursuant to R.C. 131.01 and R.C. 131.07. The trial court correctly held that such funds need not be so deposited.

The trial court in its decision on the motion to dismiss quite correctly determined that Article IV, section 2(B) (1) (g) "does not confer original *and exclusive* jurisdiction in the Supreme Court in *all* matters relating to the practice of law. ***It is true that the grant of original jurisdiction contained therein is couched in broad terms and on its face appears unrestricted. Yet, this court is of the opinion that where actions taken pursuant to the grant are in direct conflict with other constitutional provisions they must be said to be improper."

We are in agreement with the trial court in this regard and believe that our court system should remain open to our citizens to test the lawfulness of the acts of any one of our three branches of government — the executive, legislative, or judiciary. Here it is our view that if the complaint had alleged certain facts such as the collection of an unreasonable and unwarranted registration fee, or a misuse or misappropriation of the collected funds, or had alleged other acts by the commission or its staff which were deemed to be unlawful, unconstitutional or unreasonable, such allegations would entail the necessary submission of evidence and would require a determination upon such facts. In any such instance, the merits of the matter could not have been decided upon a motion for judgment on the pleadings as was done here.

However, the complaint here does not specifically allege that the annual fee of twenty-five dollars is unreasonable or unwarranted, or allege any unlawful or unreasonable use of the fees collected, or any unlawful acts being committed by the commission or its staff. An overall reading of the complaint leads us to the conclusion that all of the allegations are not such that would require the court to entertain presentation of evidence in relation to such allegations, and that the court properly determined that it could decide the motion for judgment on the pleadings on the questions of law presented to the court.

We hold that the trial court was correct in finding that plaintiffs had failed to show that any of the challenged rules were clearly incompatible with any Ohio constitutional provision.

We further hold that the trial court was correct in determining that the Supreme Court of Ohio had authority under constitutional provision Article IV, section 2(B) (1) (g) to promulgate the rules in question in this action.

Based upon all of the foregoing, the assignment of error of appellant Crede Calhoun is hereby overruled, and all the assignments of error of appellant Cuyahoga County Bar Association are also hereby overruled.

Accordingly, the judgment of the Common Pleas Court of Franklin County is hereby affirmed.

REILLY and McCORMAC, JJ., concur.